

Exhibit F

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	
	:	
LEHMAN BROTHERS INC.,	:	Case No. 08-01420 (JMP) SIPA
	:	
Debtor.	:	
	:	
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**RESPONSE OF UNDERWRITER CLAIMANTS TO THE
TRUSTEE'S ONE HUNDRED FOURTH OMNIBUS OBJECTION TO
GENERAL CREDITOR CLAIMS (NO LIABILITY CLAIMS)**

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ANZ Securities, Inc., BMO Capital Markets Corp. (f/k/a Harris Nesbitt Corp.), BNY Mellon Capital Markets, LLC, Cabrera Capital Markets, LLC, DnB Nor Markets, Inc., BNP Paribas FS, LLC (as successor in interest to Fortis Securities, LLC, f/k/a Fortis Investment Services, LLC), nabSecurities, LLC (f/k/a nabCapital Securities, LLC), National Australia Bank Ltd., National Financial Services, LLC, SunTrust Robinson Humphrey, Inc., and The Williams Capital Group, L.P. (collectively, the “Junior Underwriters”) hereby file their response (the “Response”) in opposition to the Trustee’s One Hundred Fourth Omnibus Objection to General Creditor Claims (No Liability Claims) (the “Objection”), (D.I. 6768), to the extent that the Objection pertains to Claims No. 5678, 5133, 5682, 5683, 4360, 5686, 4944, 5127, 5738, 5673, 5841, and 5667 (collectively, the “Claims”) filed by the Junior Underwriters against Lehman Brothers Inc. (“LBI”), the Debtor in the above-captioned SIPA proceeding.¹ In support of this Response, the Junior Underwriters respectfully state as follows:

PRELIMINARY STATEMENT

1. In a results-oriented effort to expunge or subordinate the Claims, the Objection ignores both the clear contractual and statutory bases on which the Claims are asserted and have become liquidated, as well as the basic inapplicability of Section 510(b). The Claims are based on the Junior Underwriters’ enforceable right to contribution from LBI for losses incurred by the Junior Underwriters in defending and settling certain lawsuits related to the offering of securities of Lehman Brothers Holdings Inc. (“LBHI”), nearly ninety percent of which were underwritten by LBI. The Junior Underwriters’ rights to contribution from LBI arise from: (1) binding contracts between LBI and the Junior Underwriters; and (2) Section 11(f) of the Securities Act of

¹ The Response is joined in relevant part by UBS Financial Services Inc. (“UBS FS”), which also files its own response in opposition to the Objection to the extent that the Objection pertains to Claim No. 5275 filed by UBS FS against LBI.

1933, 15 U.S.C. § 77k(f). Moreover, the Claims are plainly not contingent, where the Junior Underwriters have already incurred substantial out-of-pocket costs in connection with these lawsuits, and LBI's liability to share in these losses is set by contract such that the Claims do not depend on any future determination. Finally, the Claims arise from the purchase or sale of securities issued by LBHI, rather than LBI, which do not represent any claims or interests in this SIPA proceeding. As such, it is impossible to subordinate the Claims below the level of "such securities," rendering both the plain text as well as the statutory purpose of Section 510(b) of the Bankruptcy Code inapplicable.

BACKGROUND

2. Between 2006 and 2008, LBI was – by many orders of magnitude – the largest underwriter of numerous offerings of registered securities issued by its corporate parent, LBHI. See, e.g., Declaration of Peter Fox, Attached as Exhibit A ("Fox Decl."), Exs. 2-26.² LBI was the lead underwriter in all of these offerings that underpin the Claims. See id.

3. In order to participate in LBI-led offerings during this time period, each of the Junior Underwriters was required by LBI to enter into the Lehman Brothers Inc. Master Agreement Among Underwriters, dated December 1, 2005 ("MAAU"). See id., Ex. 1 (MAAU Preamble); id. (MAAU § 12.8 ("Execution in Counterparts")). The MAAU governed the relations between underwriters in all LBI-led offerings, see id., Ex. 1 (MAAU Preamble), and contained provisions that remained in effect long after any particular offering had closed, see id. (MAAU § 9.8 ("Survival of Agreements")). Among other things, the MAAU contained provisions that required each underwriter to contribute, based on its agreed percentage participation in an offering, towards any losses or liabilities incurred by another underwriter

² For the convenience of the Court, a tabular summary of the relevant offerings of LBHI securities is attached as Appendix A.

5. After LBHI commenced its separate Chapter 11 proceedings in September 2008, a number of investors filed lawsuits, including class actions, against the Junior Underwriters. These actions alleged, inter alia, that LBHI's offering documents contained material misstatements and omissions, and that the Junior Underwriters – in their capacities as underwriters of LBHI-issued securities – were liable for damages under Section 11 of the Securities Act of 1933 (“Actions”). See App. B.³ In response to the Actions, the Junior Underwriters retained counsel to investigate and defend the investors' claims against them.

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fees and settlement payments. See Declaration of Hayden McNamara, attached as Exhibit B; Declaration of Michael G. Zeiss, attached as Exhibit C; Declaration of Julie Lauck, attached as Exhibit D; Declaration of Jonathan R. Goldblatt, attached as Exhibit E; Declaration of Andrew Druch, attached as Exhibit F; Declaration of Mark Jensen, attached as Exhibit G; Declaration of Richard Rauchenberger, attached as Exhibit H; Declaration of Woodruff Polk, attached as Exhibit I; Declaration of Patrick Wo, attached as Exhibit J; and Declaration of William Nurthen, attached as Exhibit K (collectively, the “Junior Underwriter Decls.”).⁴ LBI, which was not named as a defendant in the Actions because of the automatic stay associated with this proceeding, has not shared in the Junior Underwriters’ defense costs or contributed to their settlements. For its part, LBI has identified only the legal costs associated with obtaining withdrawal of claims asserted against LBI by certain plaintiffs in the Actions – approximately \$93 thousand – which amounts to a tiny fraction of the Junior Underwriters’ costs.⁵

ARGUMENT

A. The Junior Underwriters Have Enforceable Contractual and Statutory Claims for Contribution from LBI

7. In asserting that LBI has no liability for the Claims, the Objection ignores both the contractual and federal statutory rights that the Junior Underwriters have to contribution from LBI. Their contractual right to contribution springs from the plain terms of the MAAU, and their statutory right to contribution is found in Section 11(f) of the Securities Act of 1933. These rights attach regardless of whether there was a final determination that LBHI’s offering materials

⁴ For the convenience of the Court, a tabular summary of the losses, costs and expenses incurred by the Junior Underwriters, full details of which are provided in the Junior Underwriter Declarations, is attached as Appendix C.

⁵ In lieu of formal discovery, the LBI Trustee agreed to voluntarily provide this loss figure to the Junior Underwriters, which his counsel has confirmed represents the identified amount of losses, claims damages or liabilities suffered by LBI in connection with the Actions and related proofs of claim asserted in this proceeding. See Fox Decl., Ex. 27.

contained false statements or omissions, and they are not satisfied until LBI has paid its proportional share of the costs associated with Actions – something that has yet to happen. As of today, the Junior Underwriters have paid almost \$78 million. By contrast, LBI, which underwrote the overwhelming majority of the LBHI securities at issue (and received the lion's share of related underwriting fees), has identified only \$93 thousand in losses that it incurred. Moreover, because the SIPA claims filed by certain plaintiffs in the Actions have now been withdrawn, (see D.I. 6595 (Notice of Resolution of Trustee's Seventy-Ninth Omnibus Objection to General Creditor Claims (No Liability Claims))), there is no prospect that the LBI estate's losses in relation to the Actions will ever approach those of the Junior Underwriters.

Contractual Right to Contribution

8. The MAAU requires LBI to pay, as contribution, its underwriting percentage of the Junior Underwriters' out-of-pocket expenses in the Actions. This obligation arises from the unambiguous language of Section 9.5 of the MAUU, which makes clear that, for each offering, each underwriter is responsible for its underwriting percentage of each other underwriters' losses related to alleged misstatements and omissions contained in the offering materials. The provision applies to every offering on which the Junior Underwriters were sued, and remains in effect to this day.

9. Section 9.5 of the MAAU bears the heading, "Contribution," and states in relevant part:

Notwithstanding any settlement on the termination of the applicable AAU, each Underwriter agrees to pay upon request of the Manager, as contribution, its Underwriting Percentage of any losses, claims, damages or liabilities, joint or several, paid or incurred by any Underwriter to any person other than an Underwriter, arising out of or based upon any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement [or other offering materials] or the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading.

Fox Decl. Ex. 1 (MAAU § 9.5).

10. There is no ambiguity about what Section 9.5 requires. First, all underwriters must contribute toward “any losses, claims, damages or liabilities, joint or several, paid or incurred” by any other underwriter as a result of alleged misstatements or omissions in the offering materials. Second, the amount of such contribution is fixed by the percentage of the offering underwritten by the contributing underwriter – that underwriter’s “Underwriting Percentage.”⁶ As such, when an underwriter is alleged to have violated Section 11 of the Securities Act – the language of which Section 9.5 tracks word-for-word – each other underwriter must contribute to that underwriter’s losses arising from defense and resolution of the lawsuit. The amount of contribution one underwriter owes to another underwriter is set at the contributing underwriter’s agreed underwriting percentage – a figure that is already established on the face of the offering materials. Thus, contrary to the Trustee’s contentions, LBI’s responsibility to make fixed contribution payments is established by the terms of the MAUAU regardless of whether there has been a final judicial determination either as to whether the offering materials contained false statements or omissions or as to LBI’s proportionate share of any damages arising therefrom.

11. These MAUAU terms were fully incorporated into each offering-specific agreement among underwriters, see id. (MAAU Preamble), and so they bound LBI and participating Junior Underwriters in every offering at issue in the Actions. As Section 9.5 survived termination, it continues to apply to the Claims. See id. (MAAU § 9.8 (“Survival of Agreements”)).

⁶ “Underwriting Percentage” is defined in the MAUAU to mean the ratio which the contributing underwriter’s purchase obligation bears to the total amount of securities issued in a given offering. See Fox Decl., Ex. 1 (MAAU § 1.1).

12. While Section 9.5 contemplates that the required contribution payments would be made “upon request of the Manager” (i.e., LBI, see id. (MAAU § 1.1 (“Certain Definitions”))), this language does nothing to absolve LBI of liability, nor does the Objection suggest as much. As an initial matter, it is incongruous to require LBI to “request” contribution of itself, and to do so would be a purely formalistic exercise.⁷ Moreover, the “upon request of the Manager” device must be read in conjunction with other provisions in the MAUA that require that LBI, as manager, to investigate any relevant allegations concerning the offering materials, retain counsel on behalf of the underwriting syndicate and defend the syndicate in any such actions. See id. (MAUA §§ 9.3 (“Post Settlement Expenses”) and 9.6 (“Procedure”)). As a result of the commencement of these SIPA proceedings, LBI did not perform these functions nor request contribution from other underwriters for related costs and expenses. To permit LBI to evade its contribution obligations based on its own failure to perform under the MAUA would effectively permit LBI to benefit from its own breach. See Market Street Assoc. Ltd. P’ship v. Frey, 941 F.2d 588, 592 (7th Cir. 1991) (holding that “a contracting party cannot be allowed to use his own breach to gain an advantage by impairing the rights that the contract confers on the other party” (citing Spanos v. Skouras Theatres Corp., 364 F.2d 161, 169 (2d Cir. 1966))); see also Kirke La Shelle Co. v. Paul Armstrong Co., 177 N.E. 163, 167-68 (N.Y. 1933) (holding that a party that breached its obligations under a contract cannot rely on that breach to avoid its obligations under the contract). Finally, Sections 9.3 and 9.6 of the MAUA evince the parties’ intent that LBI

⁷ Moreover, it is not clear that LBI even remains the “Manager” for the purposes of the MAUA. Section 9.9 of that document provides for the replacement of the Manager in the event that LBI settles, but other underwriters do not settle, a lawsuit against the underwriting syndicate. See Fox Decl., Ex. 1 (MAUA § 9.9 (“Replacement of Manager”)). As noted above, while LBI was not named as a defendant in the Actions, certain plaintiffs in those Actions did file proofs of claim against the LBI estate, which the LBI Trustee successfully had withdrawn, effectively “settling” the Actions in relation to it. To the extent that LBI is no longer the Manager, the new Managers among the Junior Underwriters, by and through the Claims, have requested that LBI contribute as required by Section 9.5.

ensure that the costs and benefits of mounting a defense to a Section 11 action be fairly distributed throughout the underwriting syndicate. This responsibility includes enforcement of the MAAU's contribution provision – even against itself.

Statutory Right to Contribution

13. While the terms of the MAAU alone provide a clear basis for liability, the Junior Underwriters also have an independent right to contribution from LBI under Section 11(f) of the Securities Act of 1933. In relevant part, Section 11(f) provides that any person who makes “any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment. . .” 15 U.S.C. § 77k(f)(1).

14. From the Securities Act's inception, it has been understood that Section 11(f) allows for defendants sued under Section 11(a) to seek contribution in a separate action from parties who have not been named directly in an action by the plaintiffs, but who would have been jointly or severally liable if they had been named. See, e.g., William O. Douglas & George E. Bates, The Federal Securities Act of 1933, 43 Yale L. J. 171, 180-81 (1933); Employers Ins. of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575, 580 (9th Cir. 1992). There is substantial precedent for free-standing or third-party actions for contribution under other analogous contribution provisions contained in, or implied from, the Securities and Exchange Acts. See, e.g., Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 288 (1993) (free-standing action for contribution under Rule 10b-5); Smith v. Mulvaney, 827 F.2d 558, 559 (9th Cir. 1987) (same); Heizer Corp. v. Ross, 601 F.2d 330, 334 (7th Cir. 1979) (same); McCoy v. Goldberg, 778 F.Supp. 201, 203 (S.D.N.Y. 1991) (third-party action for contribution under Rule 10b-5); Odette v. Shearson, Hammill & Co, Inc., 394 F.Supp. 946, 958 (S.D.N.Y. 1975) (third-

underwriter of the securities at issue in the Actions, it too would have been liable to the plaintiffs. Thus, LBI is liable under Section 11(f) to contribute to the Junior Underwriters' for their settlement payments to the plaintiffs. Under principles of comparative fault, the amount of LBI's contribution should be set at no less than its underwriting percentage in the offerings at issue in the Actions.⁹

Nothing in the Objection Serves to Defeat the Basis for the Claims

18. The Trustee's argument that the Junior Underwriters are not entitled to contribution from LBI because, "the alleged false statements and omissions have not been established," Objection ¶ 15, has no basis in either the MAAU or Section 11(f). There is nothing in the MAAU that makes an underwriter's right to contribution depend on a finding that the offering materials at issue actually contained false statements or omissions. On the contrary, Section 9.5 expressly requires contribution for losses associated with any "alleged untrue statement of a material fact" or "alleged omission." The fact that the Junior Underwriters have been hailed into court to defend against accusations that they violated Section 11 is by itself sufficient to trigger the MAAU's contribution provision. Similarly, as discussed above, a defendant's settlement of Section 11 claims – and concomitant denial of wrongdoing – does not prevent it from seeking contribution under Section 11(f) for those settlement payments from other parties who could also be liable to the plaintiff. See Del-Val, 868 F. Supp. at 554.

⁹ Should the Court decline to decide the parties' relative culpability on the basis of their underwriting percentages but also consider the parties' other conduct, cf. Smith, 827 F.2d at 562 (in deciding a claim for contribution based on Rule 10b-5, trial court should consider "evidence which either compares or allows a comparison of the extent of the fault" of the parties), the Junior Underwriters reserve the right to submit additional evidence concerning, inter alia, LBI's comparative knowledge and ability to verify the statements in the offering materials, LBI's relative opportunities to conduct due diligence concerning LBHI, and any role LBI, as an affiliate of LBHI, may have had in making or negligently failing to detect the allegedly false statements in the offering materials. Any such proceedings, however, should follow only if the Court determines at the initial hearing on the Objection that the underwriters' underwriting percentages are not determinative. See Local Rule 9014-2 (providing that absent prior order, the first scheduled hearing on a contested matter will not be an evidentiary hearing).

¹¹ It bears mentioning that LBI has also not paid its proportional share of losses suffered by other junior underwriters as a result of the Actions. Several of these other underwriters have filed claims that remain pending against LBI, though they are not the subject of the Objection.

Objection ¶ 22.¹² As discussed above, neither basis for the Claims turns on a judicial finding of the Junior Underwriters' liability. Under the MAUA, the Junior Underwriters became entitled to contribution from LBI the moment they were named as defendants in the Actions; under Section 11(f) the right attached upon their settlement with the plaintiffs in the Actions. Similarly, the absence of any judicial determination of the amount of LBI's liability on the Junior Underwriter's contribution claims is irrelevant, where the amount of money LBI is obligated to contribute is set by contract.

23. Moreover, the Trustee's attempt to disallow the Claims under Section 502(e) is at odds with its statutory purpose, where the withdrawal of plaintiff's claims leaves no risk of double liability. "The sole purpose served by section 502(e)(1)(B) is to preclude redundant recoveries on identical claims against insolvent estates." In re Hemingway Transp., Inc., 993 F.2d 915, 923 (1st Cir. 1993) (emphasis added); see also H.R. Rep. No. 595, 95th Cong., 1st Sess. 354 (1977) (advocating that § 502(e)(1)(B) be enacted "to prevent competition between a creditor and his guarantor for the limited proceeds for the estate"). There is no such risk of a double recovery here because the plaintiffs in the Actions have either failed to file or have withdrawn their proofs of claim against LBI.

24. While the Objection relies on In re Drexel Burnham Lambert Group Inc. ("Drexel I"), 146 B.R. 98 (Bankr. S.D.N.Y. 1992), and In re Drexel Burnham Lambert Group Inc. ("Drexel II"), 148 B.R. 982 (Bankr. S.D.N.Y. 1992), neither case compels a different result.

¹² The argument is also undermined by the Trustee's own recognition that the Junior Underwriters and LBI are co-liable to the plaintiffs in the Actions. See Objection ¶ 20 ("the second element of section 502(e)(1)(B) [co-liability] is also satisfied"). Of course, LBI is not co-liable with the Junior Underwriters to the Junior Underwriters' attorneys for legal fees. See In re RNI Wind Down Corp., 369 B.R. 174, 187-91 (Bankr. D. Del. 2007) (overruling the plan administrator's objection to an indemnification claim for legal expenses because, among other things, the debtor was not co-liable, for the purposes of Section 502(e)(1)(B), to the claimants' attorneys). Thus, even if the Claims were contingent – which they are not – the relevant portions of the Claims that represent the Junior Underwriters' legal expenses must still be allowed because of the absence of co-liability, which alone renders 502(e)(1)(B) inapplicable.

Indeed, Drexel I expressly recognizes that, when a party's liability for contribution is set by contract, there is no need for a judicial determination of such liability and the claim for contribution is not contingent. See 146 B.R. at 101. Lest there be any doubt, the court in Drexel II actually allowed contribution claims based on a contract among underwriters. See 148 B.R. at 990.¹³ Nor do Drexel I or Drexel II stand for the proposition that a contribution claim is contingent unless or until the claimant's underlying liability to a third party is determined by a court. On the contrary, in Drexel I, the court expressly rejected the argument that the claimant was not liable to the plaintiff in the underlying securities action because it had settled the matter. See 147 B.R. at 102. What matters for the purposes of Section 502(e)(1)(B) is that the Junior Underwriters have incurred out-of-pocket expenses that trigger liability, not that there has been a final determination on the merits of the Actions. Compare Drexel II, 148 B.R. at 987 (contribution claims disallowed as contingent where "payment has not been made to the plaintiff in the underlying action") with id. at 990 (contribution claims allowable where payment had been made to defense counsel even in the absence of judgment or settlement of the underlying action).

25. Finally, the Trustee's argument that the Claims are contingent because it has not been established that LBHI cannot pay indemnification, see Objection ¶ 24, is irrelevant. The

¹³ To the extent that Drexel I holds that a non-contractual claim for contribution remains contingent until another court has determined the extent of the debtor's liability, see 98 B.R. at 102-03, the case is wrongly decided. In Drexel I, the court disallowed a non-contractual claim for contribution by a settling defendant in a securities case on the grounds that no court had determined the relative fault of debtor, Drexel, vis-à-vis the claimant. See id. at 105. However, determining the parties' relative culpability is the central function of the court presented with a contribution claim under the federal securities laws. See Musick, 954 F.2d at 580; Smith, 827 F.2d at 561. Thus, both here and in Drexel I, it is and was the Bankruptcy Court's job to decide the parties' relative culpability in ruling on the proof of claim where contribution rights were asserted. Had the claimants implied Drexel into their securities case, the task would have fallen to that court; had they launched a free-standing action against Drexel in some other federal district court, the parties relative culpability would have been determined there. The holding in Drexel I leads only to an absurd result: The court would not rule on the claim because it believed that the claim was contingent, but the claim remained contingent only because the court would not rule on it. Such circular reasoning is not the law.

Claims are not based on any agreement with LBHI, nor does Section 9.5 of the MAAU or Section 11(f) of the Securities Act require an underwriter to seek indemnification from an issuer before pursuing contribution claims against another underwriter.

C. Section 510(b) of the Bankruptcy Code Does Not Apply to the Claims

26. The Claims relate to the purchase of LBHI's securities, which do not represent any claims or interests in this SIPA proceeding for LBI, rendering the plain text of Section 510(b) of the Bankruptcy Code, 11 U.S.C. § 510(b), inapplicable. This alone prevents mandatory subordination. Nor do the Claims implicate the two policy justifications to which the Second Circuit has held any interpretation of the statute must conform: (i) the Junior Underwriters never took on the risk and return expectations of a shareholder; and (ii) the Claims do not seek to recover a contribution to the equity pool. See In re Med Diversified, Inc., 461 F.3d 251, 256 (2d Cir. 2006). Failing to grasp the import of these distinctions, the Trustee urges the court to subordinate the Claims in an arbitrary fashion that would ignore the statutory text and frustrate the clear policy underpinning Section 510(b).

27. As the Trustee correctly notes, Congress enacted Section 510(b) "to prevent disappointed shareholders from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding." Objection ¶ 13 (quoting In re Enron Corp., 341 B.R. 141, 158 (Bankr. S.D.N.Y. 2006)). Accordingly, Section 510(b) provides:

For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b) (emphasis added).

28. Thus, if an investor claimant re-characterizes his claim as one for rescission, damages, or contribution related to the purchase or sale of his security, the claim is subordinated to “all claims or interests that are senior to or equal the claim or interest represented by such security.” The statute knocks down the would-be bootstrapper in priority to below where he would have been had he simply based his claim on his ownership of the security. For this system to work – and the statute to apply – the security whose “purchase or sale” gives rise to the potentially subordinated claim must currently represent claims or interests in the same bankruptcy proceeding. Not only does the statutory text compel this result, but the Objection cites no case to the contrary.

29. Subordination is inherently a relative concept – a court can only subordinate a claim to another claim or interest to another interest. For this reason, Section 510(b) expressly designates the claims to which a securities-related claim is subordinated: namely, those claims “represented by such security.” If there are no claims “represented by such security” in the debtor’s capital structure, the court has nothing to which it can subordinate the rescission, damages, or contribution claims, and Section 510(b) cannot apply by its literal terms.¹⁴ Cf. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (where a “statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms’” (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))).

¹⁴ The Trustee implicitly recognized this disconnect in a subsequently filed objection, wherein he argued that Section 510(b) applied to claims arising from the purchase or sale of LBHI securities but was unable to specify the level to which such claims should be subordinated. (See D.I. 7158 (The Trustee’s One Hundred Thirty-First Omnibus Objection to General Creditor Claims (Employee Equity Claims) ¶ 23 n.9 (“The Trustee takes no position as to the validity, value, or level of priority of subordinated and reclassified Accrued Equity Claim at this time and reserves the right to raise arguments as to these issues should the need arise.”))).)

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unsecured creditors from having their recoveries diluted when they expected to have rights senior to equity shareholders). Clearly, the motivating force behind the statute's enactment was Congress's concern about the fair treatment in bankruptcy proceedings of creditors vis-à-vis investors. But, where there are no remaining investor claimants in a bankruptcy proceeding, there is no investor-creditor fairness concern – all claimants are creditors – and, accordingly, Congress did not provide for mandatory subordination.

32. While some courts outside of this Circuit have failed to appreciate this distinction, their holdings are both at odds with the Second Circuit's holding in Med Diversified and basic canons of statutory interpretation. In re VF Brands, Inc., 275 B.R. 725 (Bankr. D. Del. 2002), for example, shows how an erroneous interpretation of Section 510(b) can create the very unequal treatment of similarly situated claims that Congress, in passing the statute, sought to prevent. In VF Brands, the claimant, Money's Trust, filed a proof of claim sounding in contract and tort for damages arising from the acquisition of one of the debtor's former subsidiaries, Vlastic Farms, Inc. See id. at 726. Vlastic Farms, having been spun-off, was not a debtor in the proceeding, and Money's Trust did not – and indeed could not – assert any claim based on its ownership of Vlastic Farms' stock. See id. Nevertheless, the court subordinated the claim to the level of the debtor's common stock. The reasoning behind this decision was opaque,¹⁶ but its deleterious effect was clear. Money's Trust, which never invested in the debtor and never shared

¹⁶ For one thing, the VF court never explained how, in the absence of any claims represented by "such security" – i.e., any claim represented by a Vlastic Farms security – the court was able to determine where to place Money's Trust's claim in the capital structure. Tellingly, the court misquoted Section 510(b) replacing "shall be subordinated to all claims or interests that are senior to or equal to the claim or interest represented by such security," with "senior or equal to the claims of Money's Trust." 275 B.R. at 727 (emphasis added). The two statements are obviously not the same. Intrinsically, Money's Trust's claim was present in the priority structure; claims represented by Vlastic Farms' securities were not. Additionally, to the extent that the VF court based subordination on the fact that Money's Trust's claim arose from the purchase or sale of common stock, see id., it ignored the basic difference between the common stock involved in the transaction related to Money's Trust's claim and the common stock representing claims and interests in the bankruptcy proceedings.

the expectations of the debtor's shareholders, was treated as if it had been a common stockholder, while the other general unsecured creditors – by virtue of the unjustified subordination of Money's Trust's claim – received a windfall. Cf. Med Diversified, 461 F.3d at 258 (courts must guard against “attempts by a bankruptcy debtor to clothe a general creditor in the garb of shareholder”).

33. Moreover, the policy justification that the VF court articulated for its ruling misconstrues Congressional intent, as articulated by the Second Circuit in Med Diversified. The VF court correctly noted that “Congress intended to prevent disaffected equity investors from recouping their investment losses in parity with general unsecured creditors in the event of bankruptcy.” Id. at 728 (quoting In re Telegroup, Inc., 281 F.3d 133, 142 (3d Cir. 2002)). However, it misapplied this rationale to Money's Trust's claims, stating that “to hold, as Money's Trust asserts, that it retains an unsubordinated general unsecured claim against [the debtor] for damages arising from its investment in Vlasic Farms would give it the best of both worlds – the right to share in profits if Vlasic Farms succeeded and the right to repayment (from the [debtor]) if it failed.” VF Brands, 275 B.R. at 728. But whatever equity risk was associated with Money's Trust's investment in Vlasic Farms was totally unrelated to the right it sought to vindicate in the debtor's bankruptcy proceeding. Because Money's Trust never invested in the debtor, it had no “investment loss” to recoup through its general unsecured claim. The VF court thus conflated the parent debtor's identity with that of its former subsidiary. Cf. Mark P. Kronfeld, Vincent Indelicato, & Chris Theodoridis, The Murkiness of Corporate Separateness in Chapter 11, 32 Am. Bankr. Inst. J. 46, 89-90 (2013) (noting that the result in VF Brands is inconsistent with the principle of corporate separateness).

34. To be sure, ownership of the debtor's security is not a requirement for subordination under Section 510(b). As the Trustee points out, indemnification claims of underwriters against bankrupt issuers have been properly subordinated under that section. See, e.g., In re Jacom Computer Servs., 280 B.R. 570, 572 (Bankr. S.D.N.Y. 2002); In re Mid-Am. Waste Sys., Inc., 228 B.R. 816, 824-26 (Bankr. Del. 1999). But – again – the securities at issue in the transactions related to the subordinated claims were those of the debtor, and thus represented claims or interests in the bankruptcy proceedings where the claims were filed. The facts of these cases fit with the text of Section 510(b) and subordination served the statute's policy. Just as Congress, in passing Section 510(b), focused on apportioning the risk of a debtor's failure between its creditors and its shareholders, see Med Diversified 461 F.3d at 256, the courts in these cases were concerned about the distribution of that risk as between the creditors and the debtor's underwriters, see Jacom Computer Servs., 570 B.R. at 572. The debtor's underwriters are better positioned to manage this risk than its creditors, and so their claims are subordinated. See id.

35. Here, the Junior Underwriters are neither LBI shareholders nor LBI underwriters. The Junior Underwriters were involved in the issuance of LBHI's securities, not those of LBI. They did not expect or bargain to share in the rewards of LBI's success, and were mere contractual creditors of LBI, with whom they had a contractual relationship as co-underwriters. Subordination in this case would undermine the policy underpinning Section 510(b). Rather than fulfilling the relative expectations of LBI's creditors, investors, and underwriters, subordination of the Claims would arbitrarily discriminate against one class of general unsecured creditors in

favor another, permitting the LBI estate to retain the benefits of its underwriting fees while evading claims that arose from those underwritings.¹⁷


CONCLUSION

36. For the foregoing reasons, the Court should (i) overrule the Objection in all respects, (ii) allow the Claims based on LBI's underwriting percentage of the relevant Junior Underwriters' losses, and (iii) grant such other and further relief as may be just and proper.

Dated: September 9, 2013
New York, New York

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¹⁷ Even if the Court does subordinate the Claims, those claims that are on account of damages claims arising from the purchase of LBHI senior notes should only be subordinated to the level of general unsecured creditors. As discussed above, claims must only be subordinated to the level of claims represented by "such security." Some of the securities at issue in the Actions are senior notes issued by LBHI, see, e.g., Fox Decl., Exs. 17-A and 25, which pursuant to LBHI's confirmed plan, are senior to general creditor claims in the LBHI proceeding. See Notice of Filing of Modified Third Amended Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and its Affiliated Debtors, Section 4.3, In re Lehman Brothers Holdings Inc., Case No. 08-13555, D.I. 22973 (Bankr. S.D.N.Y. Dec. 5, 2011). If the Court adopts the Trustee's approach to engraft LBHI's capital structure onto LBI's in order to shoehorn the Claims into Section 510(b), then by implication, those of the Claims related to the purchase or sale of LBHI senior notes should be subordinated only below the level of those senior notes (i.e., to the level of general creditor claims).

APPENDIX A

Date	CUSIP	Offering Amount	Junior Underwriter(s) and Their Predecessors and Affiliates	LBI Underwriting Percentage
10/18/2004	52517PXT3	\$500,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • Fortis Securities LLC • Mellon Financial Markets, LLC • Harris Nesbitt Corp. • SunTrust Robinson Humphrey 	86%
10/18/2004	52517PXU0	\$575,000,000.00	<ul style="list-style-type: none"> • The Williams Capital Group, L.P. 	85%
10/26/2004	52517PXU0	\$25,000,000.00	<ul style="list-style-type: none"> • The Williams Capital Group, L.P. 	85%
1/4/2005	52517PYN5	\$1,000,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • BNY Capital Markets, Inc. • DnB Nor Markets, Inc. • Harris Nesbitt Corp. • National Australia Bank Ltd. • SunTrust Robinson Humphrey 	86%
1/27/2005	52517PYN5	\$100,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • BNY Capital Markets, Inc. • DnB Nor Markets, Inc. • Harris Nesbitt Corp. • National Australia Bank Ltd. • SunTrust Robinson Humphrey 	86%
1/27/2005 (2/1/2005)	52517PYN5	\$100,000,000.00	<ul style="list-style-type: none"> • Harris Nesbitt Corp. 	98%
7/6/2005	52517PA35	\$1,000,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • BNY Capital Markets, Inc. • Harris Nesbitt Corp. 	85%

12/14/2005	52517PD57	\$750,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • SunTrust Robinson Humphrey, Inc. • The Williams Capital Group, L.P. 	90%
3/22/2006	52517PF63	\$1,000,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • Harris Nesbitt Corp. • National Australia Bank Ltd., London Branch • SunTrust Robinson Humphrey, Inc. 	89%
4/18/2006	52517PG96	\$500,000,000.00	<ul style="list-style-type: none"> • Mellon Financial Markets, LLC • The Williams Capital Group, L.P. (on behalf of Northern Trust) 	95%
8/24/2006	52517PK83	\$100,000,000.00	<ul style="list-style-type: none"> • Mellon Financial Markets, LLC 	98%
10/24/2006	524908UB4	\$1,250,000,000.00	<ul style="list-style-type: none"> • Fortis Securities LLC • SunTrust Capital Markets, Inc. 	88%
11/9/2006	52517PN98	\$1,350,000,000.00	<ul style="list-style-type: none"> • BNY Capital Markets, Inc. 	98%
1/9/2007	52517PR60	\$1,500,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • BNY Capital Markets, Inc. • SunTrust Robinson Humphrey 	90%
5/22/2007	52517P2K6	\$2,750,000,000.00	<ul style="list-style-type: none"> • Williams Capital Group, L.P. 	98%
7/12/2007	52517P4C2	\$1,500,000,000.00	<ul style="list-style-type: none"> • Mellon Financial Markets, LLC • Williams Capital Group, L.P. 	90%
7/12/2007	524908R36	\$2,000,000,000.00	<ul style="list-style-type: none"> • National Australia Bank 	91%
7/12/2007	524908R44	\$1,500,000,000.00	<ul style="list-style-type: none"> • BNY Capital Markets, Inc. • SunTrust Capital Markets, Inc. 	94%

9/19/2007	52517P5X5	\$2,250,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • Cabrera Capital Markets, LLC • Harris Nesbitt • Mellon Financial Markets, LLC • SunTrust Robinson Humphrey 	86%
9/19/2007	52517P5Y3	\$1,000,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • Cabrera Capital Markets, LLC • Harris Nesbitt • Mellon Financial Markets, LLC • SunTrust Robinson Humphrey 	86%
12/17/2007	5249087M6	\$1,500,000,000.00	<ul style="list-style-type: none"> • ANZ Securities, Inc. • BNY Capital Markets, Inc. • SunTrust Robinson Humphrey 	85%
1/15/2008	5252M0BZ9	\$4,000,000,000.00	<ul style="list-style-type: none"> • Fortis Securities • Mellon Financial Markets, LLC • SunTrust Robinson Humphrey 	87%
2/5/2008	52520W317	\$1,650,000,000.00	<ul style="list-style-type: none"> • SunTrust Robinson Humphrey • BNY Capital Markets, Inc. • Fidelity Capital Markets Services 	12.3%
4/24/2008	5252M0FD4	\$2,500,000,000.00	<ul style="list-style-type: none"> • DnB NOR Bank ASA • Mellon Financial Markets, LLC • National Australia Bank • SunTrust Robinson Humphrey • Williams Capital Group, L.P. 	88%

5/9/2008	5249087N4	\$2,000,000,000.00	<ul style="list-style-type: none"> • Cabrera Capital Markets, LLC • Williams Capital Group, L.P. 	97%
				LBI Average Underwriting Percentage 87%

APPENDIX B

No.	Docket Number	Case Name
1.	No. 08 Civ. 5523 (S.D.N.Y.)	Operative Plasterers & Cement Masons International Association Local 262 Annuity Fund v. Fuld, et al.
2.	No. 08 Civ. 9793 (S.D.N.Y.)	Stark, et al. v. Callan, et al.
3.	No. 08 Civ. 10206 (S.D.N.Y.)	Brooks Family Partnership, L.L.C., et al. v. Fuld, et al.
4.	No. 09 Civ. 1230 (S.D.N.Y.)	Deathrow v. Fuld, et al.
5.	No. 09 Civ. 1231 (S.D.N.Y.)	Mease & Caldwell v. Fuld, et al.
6.	No. 09 Civ. 1235 (S.D.N.Y.)	Shipley v. Fuld, et al.
7.	No. 09 Civ. 1236 (S.D.N.Y.)	Warden v. Fuld, et al.
8.	No. 09 Civ. 1237 (S.D.N.Y.)	Napierala, et al. v. Fuld et al.
9.	No. 09 Civ. 1238 (S.D.N.Y.)	Zenith Insurance Co. v. Fuld, et al.
10.	No. 09 Civ. 1239 (S.D.N.Y.)	The San Mateo County Investment Pool v. Fuld, et al.
11.	No. 09 Civ. 1944 (S.D.N.Y.)	Monterey County Treasurer, on Behalf of the Monterey County Investment Pool v. Fuld, et al.
12.	No. 09 Civ. 1946 (S.D.N.Y.)	City of South San Francisco v. Citigroup
13.	No. 09 Civ. 2363 (S.D.N.Y.)	American National Life Insurance Company v. Fuld
14.	No. 09 Civ. 3475 (S.D.N.Y.)	City of Burbank v. Fuld et al.
15.	No. 09 Civ. 3476 (S.D.N.Y.)	City of San Buenaventura v. Fuld et al.
16.	No. 09 Civ. 3478 (S.D.N.Y.)	City of Fremont v. Citigroup
17.	No. 09 Civ. 6040 (S.D.N.Y.)	Vallejo Sanitation and Flood Control District v. Fuld, et al.
18.	No. 09 Civ. 6041 (S.D.N.Y.)	Washington State Investment Board v. Fuld, et al.
19.	No. 09 Civ. 6652 (S.D.N.Y.)	Contra Costa Water District v. Fuld et al.
20.	No. 09 Civ. 7878 (S.D.N.Y.)	City of Cerritos v. Citigroup

21.	No. 11 Civ. 1281 (S.D.N.Y.)	The California Public Employees' Retirement System v. Fuld, et al.
22.	No. 11 Civ. 3892 (S.D.N.Y.)	State Compensation Insurance Fund v. Fuld, et al.

APPENDIX C

Junior Underwriter(s)	Legal Fees	Settlement Payments	Total Out-of-Pocket Losses	LBI's Average Underwriting Percentage in Junior Underwriter's Offerings	Junior Underwriter's Claim Amount
ANZ Securities, Inc.	\$305,804.20	\$6,803,642.00	\$7,109,446.20	86.9%	\$6,178,108.70
BMO Capital Markets Corp., f/k/a Harris Nesbitt Corp.	\$195,562.13	\$4,159,266.00	\$4,354,828.13	87.8%	\$3,823,539.00
BNY Mellon Capital Markets, LLC	\$544,508.52	\$22,049,943.00	\$22,594,451.52	84.5%	\$19,092,311.53
Cabrera Capital Markets, LLC	\$375,867.00	\$124,133.00	\$500,000.00	89.7%	\$448,500.00
DnB Nor Markets, Inc.	\$113,363.43	\$3,175,354.00	\$3,288,717.43	86.7%	\$2,851,318.01
BNP Paribas FS, LLC (as successor in interest to Fortis Securities, LLC f/k/a Fortis Investment Services)	\$266,918.80	\$6,985,596.00	\$7,252,514.80	87%	\$6,309,687.88
nabSecurities, LLC, f/k/a nabCapital Securities, LLC and National Australia Bank, Ltd	\$173,842.57	\$7,021,557.00	\$7,195,399.57	88%	\$6,331,951.62

National Financial Services, LLC	\$32,354.05	\$1,080,895.00	\$1,113,249.05	12.3%	\$136,929.63
SunTrust Robinson Humphrey, Inc.	\$780,264.83	\$22,771,427.00	\$23,551,691.83	82.4%	\$19,401,883.73
Williams Capital Group, L.P.	\$609,270.38	\$350,000.00	\$959,270.38	91%	\$872,936.05